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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AUG - 8 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
GTE Telephone Operating Companies)	Transmittal Nos. 873, 874, 893
)	
Revisions to Tariff FCC No. 1)	CC Docket No. 94-81

OPPOSITION TO MOTION FOR STAY

The National Cable Television Association ("NCTA") and the California Cable Television Association ("CCTA"), by their attorneys, oppose the GTECA's "Motion for Stay" ("Motion"), submitted July 26, 1994, in the above-captioned proceeding.

INTRODUCTION

In 1989, the Commission authorized GTECA, over NCTA's objection, to operate video transmission facilities in a manner that violated Sections 63.54-63.55, the regulations that prohibit the provision by telephone companies of video programming directly to subscribers, either directly or indirectly through an affiliate. The regulations interpret the concept of "affiliate" broadly to bar any relationship between a "carrier" and its "customer," except the carrier-user relationship. The Commission found that GTECA's relationship with its "customer," Apollo Cablevision, when viewed in conjunction with Apollo's parent T.L. Robak, violated the cross-ownership rules because GTECA was involved simultaneously with its customer in a carrier-user relationship, and with T. L. Robak in a non-carrier-user relationship; i.e., a construction customer-construction contractor relationship.

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Instead of rejecting GTECA's proposal, the Commission chose to waive the cross-ownership prohibition on grounds that, in spite of the rule, "other good cause" existed that justified an exception in this particular case. The Commission held that the "totality of the circumstances" merited the special treatment, noting particularly GTECA's intention to undertake technical and marketing experimentation.

NCTA appealed the ruling to the United States Court of Appeals for the District of Columbia Circuit. NCTA told the court, as it had told the Commission, that irrespective of the merits of the experimentation, the benefits alleged to flow from the project could be realized without a waiver. The court, ruling in *National Cable Television Association, Inc. v. FCC*, 914 F. 2d 285 (D.C. Cir.), remanded the case to the Commission to provide the agency with an opportunity to explain why the benefits of the project could not be achieved without a waiver.

In 1993, the Commission found that the waiver was not justified under the court's governing legal standard. *General Telephone Company of California*, 8 FCC Rcd 8178 (1993). It rescinded the Section 214 authorization and waiver, providing GTECA with a 120 day transition period, which was subsequently extended, to permit the company to disengage and come into compliance with the regulation.

Rather than comply, GTECA unsuccessfully sought a stay of the Commission's ruling. Following rejection by the Commission of GTECA's stay request, the company was successful in obtaining a stay from the United States Court of Appeals for the Ninth Circuit. The case was argued May 12, 1994. The court has not yet ruled on GTECA's First Amendment claim.

With the waiver and Section 214 certificate set to expire July 17, 1994, GTECA filed separate tariffs under which it proposed to offer 39 coaxial channels each to Apollo Cablevision, and its affiliate GTE Service Corp. ("Service Corp.").

In *GTE Telephone Operating Companies*, DA 94-784, rel. Jul. 14, 1994, the Commission rejected the Service Corp. tariff (Transmittal No. 874) on the grounds that Service Corp.'s direct provision of programming violated the telephone company/cable television cross-ownership rules, but provided temporary Section 214 authority waiver so that GTECA could disengage. It set the tariff proposing transmission service to Apollo (Transmittal No. 874) for investigation to examine legal, economic and structural issues.

THE COMMISSION SHOULD REJECT GTECA'S STAY REQUEST

The time has come for GTECA's unlawful activities to end. The Commission has been more than more than fair to the company. Since the D. C. Circuit's 1990 ruling, it has been clear that GTECA would not be able to continue to operate beyond the bounds of the cross-ownership rules. Nevertheless, the company has been permitted to enjoy the full five year term of its unwarranted arrangement.

GTECA'S stay request is based on the assertion that, without a stay, its First Amendment rights will be violated. Plainly, this is not so. The statute that GTECA claims is unconstitutional, remains the law as applied to GTECA unless ruled unconstitutional by a court or changed by Congress. The notion that a private party can escape the force of a federal statute merely by asserting that an Act of Congress is unconstitutional is ludicrous on its face.

Moreover, GTECA's constitutional claim does not alter the Commission's exclusive jurisdiction, in the course of awarding a Section 214 certificate to a carrier, to "attach to the issuance of the certificate such terms and conditions as in its the judgment the public convenience and necessity may require." 47 U.S.C. § 214. The Commission did just that in 1989 when, as part of its grant of the Cerritos waiver and associated Section 214 certificate, its limited the project to a term of five years. *See General Telephone Company of California*, 4 FCC Rcd

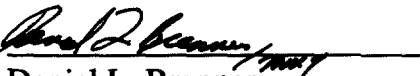
5693, 5701(1989). GTECA's suit must not be permitted to interfere with the Commission's responsibility to ensure that GTECA operate interstate facilities in the public interest.

GTECA'S constitutional claim for a stay should be understood, therefore, in its proper context. The company is arguing that the First Amendment entitles it to operate on a particular group of 39 coaxial channels in Cerritos, California, under regulatory arrangements of its own choosing. The better course is to reject the stay request, and to inform GTECA that, if its lawsuit is successful, it may construct and operate video facilities in accordance with Title II of the Communications Act and Title VI of the Cable Act.

CONCLUSION

For the foregoing reasons, the Commission should reject GTECA's "Motion for Stay."

Respectfully submitted,

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August 8, 1994

CERTIFICATE OF SERVICE

I, Leslie D. Heath, do hereby certify that on this 8th day of August, 1994, copies of the foregoing "**OPPOSITION TO MOTION FOR STAY**" were delivered by first-class, postage pre-paid mail to the following parties:

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